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Supreme Court, U.S.
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No.

IN THE

Supreme Court Of The United States

October Term, 1986

DONNIE WAITES,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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October, 1986

QUESTIONS PRESENTED

1. WHETHER THE LIMITATIONS PERIOD OF 18 U.S.C. SECTION 3282 RUNS FROM THE DATE THE OFFENSE WAS COMMITTED OR THE DAY AFTER THE OFFENSE WAS COMMITTED.

2. WHETHER A CRIMINAL CONSPIRACY CONVICTION CAN STAND WITHOUT EVIDENCE OF A DEFENDANT'S PARTICIPATION IN THE ILLICIT SCHEME.

CERTIFICATE OF INTERESTED PERSONS

I hereby certify that the following are the only persons known to Petitioner Donnie Waites and undersigned counsel who are parties to or otherwise interested in these proceedings:

Donny Waites
Joe Butler, and his counsel, Al Pennington
David R. Holmes, and his counsel, Barry Hess
Hon. Jefferson B. Sessions, III, United States Attorney for the Southern District of Alabama
Hon. Gloria Bedwell, Assistant United States Attorney for the Southern District of Alabama

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner[1] respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on July 7, 1986, with the Petition for Rehearing, and Suggestion of Rehearing En Banc denied on August 11, 1986.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported in 792 F.2d 1528, and a copy of the Slip Opinion appears in the Appendix hereto. The Indictment, jury's verdict of guilty in the Southern District of Alabama, and the court's sentencing in accord with that verdict also appear in the Appendix hereto.

[1]Petitioner is one of the co-appellants in the Court below, *United States v. Joe Butler, David R. Holmes and Petitioner Donny Waites.*

JURISDICTION

The Judgment of the Court of Appeals for the Eleventh Circuit was entered on July 7, 1986. Petitioner's Petition for Rehearing En Banc as to that Judgment was denied on August 11, 1986. This Petition for Certiorari was filed within sixty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254 (1) (1964). The Court of Appeals exercised jurisdiction pursuant to 28 U.S.C. Section 1291.

STATEMENT OF THE CASE

Petitioner Donnie Waites was indicted, along with other co-defendants and co-appellants, in the Southern District of Alabama on July 12, 1984. The Indictment as to Petitioner was framed in two Counts. Count One charged a conspiracy to violate 21 U.S.C. Section 963 and 18 U.S.C. Section 2 by importation of marijuana. Count Two charged a conspiracy to violate 21 U.S.C. Section 841 (a) (1) and 18 U.S.C. Section 2 by possession with intent to distribute and distribution of marijuana. A jury trial was held on these charges on December 3, 1984 through December 6, 1984. The jury found all defendants guilty on all Counts. Sentencing was held before the Honorable Emmett R. Cox, United States District Judge, on February 22, 1985. Petitioner was sentenced to five years imprisonment and a $5,000.00 fine as to each Count, with the custodial terms to run concurrently. Petitioner duly appealed to the United States Court of Appeals for the Eleventh Circuit.

The Court of Appeals set forth the parameters of the conspiracy proven at trial:

> On the morning of July 12, 1979, a United States Coast Guard cutter, on routine patrol in the Yucatan Straits, boarded the fishing vessel MORNING STAR. After discovering 25,000 pounds of marijuana on board, Coast Guard officers arrested the crew members. None of the appellants were aboard the vessel. An agent of the Drug Enforcement Administration recognized the name of one of the crew members as the same name in which a vehicle

was registered which was under surveillance at the Rod and Reel Fish Camp (Rod and Reel) in Ocean Springs, Mississippi. Apparently, however, the government did not at that time conduct any substantial investigation of the link between the seizure of the MORNING STAR and the activities taking place at the Rod and Reel.

In 1982, after being arrested on unrelated charges, Robert Bosarge began providing the government information regarding various drug smuggling ventures. Bosarge, who was also involved in the MORNING STAR smuggling venture, provided the government with information which led to the indictment and arrest of the appellants. 792 F.2d at 1531.

The Court of Appeals held that the conspiracy "terminated" on July 12, 1979, with the seizure of the MORNING STAR, but the Indictment filed on July 12, 1984, was "timely". The Court of Appeals held that the limitations period of 18 U.S.C. Section 3282 commences on the day *after* the last overt act of a conspiracy requiring proof of an overt act, and, in the present case, with the last date a non-overt act conspiracy is in existence.

Although Petitioner Waites suggested "role" was that he was "supposed to be" a "spotter" in a surveillance aircraft when the vessel passed through the waters of Mexico, the Court of Appeals held that "it was never established whether the plane flying above the MORNING STAR was acting as a spotter, or whether Petitioner Waites was in the plane," 792 F.2d at 1536. Nonetheless the Court of Appeals affirmed Petitioner's conviction as a knowing, willing participant in both of the charged conspiracies.

Petitioner's Petition for Rehearing, and, Suggestion for Rehearing En Banc was denied by the Court of Appeals on August 11, 1986.

Hence, this Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

1. The Decision of the Court of Appeals Is In Direct Conflict with the Plain Language of 18 U.S.C. Section 3282's Limitations Period, the Precedent of This Court, and Is An Unprincipled Extension of the Statutory Limitations Period.

The decision of the Court of Appeals in this case, relying on and adopting the Second Circuit Court of Appeals' decision in *United States v. Guerro*, 694 F.2d 898 (1982), held that for *all* conspiracies, whether requiring proof of an overt act or not, the statutory limitations period of 18 U.S.C. Section 3282 commences the day *after* the last overt act in furtherance of the conspiracy was committed, or, in the present case of a conspiracy not requiring proof of an overt act, the day *after* the last day the conspiracy was in existence. This decision is contrary to: the plain language of the statute; the decisions of this Court and the lower federal courts interpreting 18 U.S.C. Section 3282; important policy considerations underlying criminal limitations periods; and, the scope of criminal conspiracy prosecutions; and is, in fact, not supported by the authority on which it purports to rely. In effect, the Court of Appeals' decision in this case has *extended* the limitations period of 18 U.S.C. Section 3282 by one day. The ramifications of this decision, not only for conspiracy prosecutions, but for all non-capital federal offenses, renders this issue worthy of consideration by this Court on Petition for Writ of Certiorari.

A. *The Statute*

18 U.S.C. Section 3282 provides:

> Except as otherwise expressly provided by law, no person shall be prosecuted, tried or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

On its face, the clear and unequivocal statement of Congressional intent embodied in Section 3282 precludes the extension

of the limitations period to include the day *after* the offense was committed. Section 3282 is noteworthy for its brevity, clarity and unambiguous command: no exceptions to the *within* five year rule, computed from the date the offense was committed, is apparent or permitted by the face of the statute. In short, the statute does not spare as the Eleventh Circuit would have it: "within five years next after [the day after] such offense shall have been committed." The plain language of the statute precludes such a result.

B. *Toussie v. United States: Controlling Principles of Construction of Section 3282*

The decision of the Court of Appeals in this case is in direct conflict with the controlling principles of statutory construction of Section 3282 announced for this Court by Mr. Justice Black in *Toussie v. United States,* 397 U.S. 112 (1970).

Petitioner Toussie failed to register for the draft. Eight years later he was indicted, tried and convicted. The government agreed that the crime was complete in 1959, when Toussie turned eighteen and failed to register, but contended that the offense was a continuing one, based on a continuing duty to register, and thus that the crime continued to be committed each day that Toussie did not register. In the Opinion for this Court, Mr. Justice Black set forth the guiding principles of statutory construction that are directly controlling in this case:

> In deciding when the statute of limitations begins to run in a given case several considerations guide our decision. The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far distant past. Such a time may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity. For these reasons,

> and others, we have stated before "the principle that criminal limitations statutes are 'to be liberally interpreted in favor of repose,' *United States v. Scharton,* 285 U.S. 518, 522 (1932)." We have also said that "(s)tatutes of limitations normally begin to run when the crime is complete." *Pendergast v. United States,* 317 U.S. 412, 418 (1943); *see United States v. Irvine,* 98 U.S. 450, 452 (1879). And Congress has declared a policy that the statute of limitations should not be extended "(e)xcept as otherwise expressly provided by law." 18 U.S.C. Section 3282. 397 U.S. 114-15.

Neither the Eleventh nor the Second Circuit Court of Appeals make mention of these polestar principles of construction of Section 3282 in their respective decisions. In fact, the result of their decisions is in direct conflict with these controlling principles.

Finding that the argument for a continuing offense was not insubstantial, the *Toussie* Court nonetheless required clearer evidence of Congressional intent to lengthen the limitations period than was present, 397 U.S. 123, and reversed the conviction as time-barred.

> There is some cause to feel that dismissal of the indictment in such a case is an injustice in a society based on full and equal application of the laws. But while Congress has said that failure to register is a crime, it has also made prosecution subject to the statute of limitations. "Every statute of limitations, of course, may permit a rogue to escape," *Pendergast v. United States,* 317 U.S. 412, 418 (1943), but when a court concludes that the statute does bar a given prosecution, it must give effect to the clear expression of congressional will that in such a case "no person shall be prosecuted, tried, or punished." 397 U.S. 123-24.

The mandate of Section 3282 must, of course, be followed regardless of the guilt or innocence of the defendant on the underlying charge. In this case, however, there is less of a legal loophole aspect to enforcing the strict requirement of Section 3282: Petitioner is in fact innocent of the conspiracy charges and his conviction is not supported by the evidence. *See* Issue 2, *infra.*

As the Government argued in *Toussie,* the effect of the Court of Appeals' decision in this case is to extend the five year limitations period beyond that stated in the statute. Such an extension is unwarranted and forbidden by the plain language of the statute, *Toussie's* controlling principles of interpretation, and specific principles concerning limitations periods for conspiracy offenses. The Court of Appeals' decision conflicts with both the plain language of the statute and the principles announced in *Toussie.* It cannot stand.

C. *Grunewald v. United States: Specific Application of Section 3282 to Conspiracy Cases*

Grunewald v. United States, 353 U.S. 391 (1957) involved a conspiracy to defraud the United States as to certain tax matters. The conspiracy charged, 18 U.S.C. Section 371, required proof of an overt act. Applying the three year predecessor limitations period of Section 3282, this Court found that:

> The indictment in these cases was returned on October 25, 1954. It was therefore incumbent on the Government to prove that the conspiracy, as contemplated in the agreement as finally formulated, was still in existence on October 25, 1951, *and that at least one overt act in furtherance of the conspiracy was performed after that date.* For where substantiation of a conspiracy charge requires proof of an overt act, it must be shown both that the conspiracy still subsisted within the three years prior to the return of the indictment, and that at least one overt act in furtherance of the conspiratorial agreement was performed within that period. 353 U.S. 396-97. (Emphasis supplied).

In so holding, the *Grunewald* Court merely applied the well established rule that with a conspiracy requiring proof of an overt act, "(t)he statute of limitations . . . runs from the last overt act during the existence of the conspiracy." *Fiswick v. United States,* 329 U.S. 211, 216 (1946).

Noteworthy about the *Grunewald* Court's application of the *Fiswick* rule is this Court's straightforward computation of the limitations period of Section 3282: the overt act must occur

after the anniversary date of the indictment to be within the limitations period. Inferentially, if the overt act occurred *on* October 25, 1951, and not after, the prosecution would be time-barred. Clearly, no one day extension to the day after the date of the last overt act in furtherance of the conspiracy was employed by the *Grunewald* Court in its calculations. *Grunewald* stands as a clear example of this Court's actual computation of the limitations period of Section 3282 for a conspiracy.[2] This computation is contrary to that employed by the Court of Appeals in this case.

Likewise, *Brown v. Elliott*, 225 U.S. 392, 401 (1911), delineates the method of computing the Section 3282 period for a conspiracy: "(t)he period of limitations must be computed from the date of the overt act rather than the formation of the conspiracy." Again, as in *Grunewald* and *Fiswick*, the date of the overt act, and not the day after, sets the beginning point of the limitations period.[3]

Finally, and directly pertinent to this case, *Grunewald* rejects on policy grounds the Government's attempt to broaden crimi-

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[2]In *United States v. Guerro, supra*, the Second Circuit read the *Grunewald* Court's above-quoted computational formula as "dictum at best." 694 F.2d at 902. Although the fact that the Government in *Grunewald* did allege and prove an overt act after that date was crucial to the Court's holding, it is not necessary to split hairs with the Second Circuit over dicta and holding. *Grunewald, Fiswick* and *Brown*, although the latter two cases were not considered by the Second Circuit, best support Petitioner's argument as illustrative of this Court's application of Section 3282. Significantly, in no case decided by this, or any other, Court has the *Guerro* formulation been employed in interpretation of Section 3282.

[3]The lower federal courts, including the Eleventh Circuit, have followed this rule in interpreting the statutory language: the day of the last overt act begins the limitations period. *E.g., United States v. Coia*, 719 F.2d 1120, 1124 (11th Cir. 1983) (dictum); *United States v. Walls*, 577 F.Supp. 772, 774 (N.D. Ga. 1984); *United States v. Epperson*, 552 F.Supp. 359, 361 (S.D. Ill. 1982). See especially, *United States v. Coniam*, 581 F.Supp. 348, 349-50 (D.C. Conn. 1984) holding that an indictment filed on Monday, instead of Saturday, was time-barred and rejecting Government's argument that *Fed.R.Crim.P. 45* could extend Section 3282 period to permit a Monday filing where the five-year statute expired on Saturday. The *Coniam* Court computed the period from the date of the last overt act, including that day in the period, and not from the day after the overt act.

nal conspiracy prosecutions by extending the applicable limitations period:

> Prior cases in this Court have repeatedly warned that we will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions. The important considerations of policy behind such warnings need not be again detailed. . . . It is these considerations of policy which govern our holding today. As this case was tried, we have before us a typical example of a situation where the Government, faced by the bar of the three-year statute, is attempting to open the very floodgates against which [we] have warned. We cannot accede to the proposition that the duration of a conspiracy can be indefinitely lengthened merely because the conspiracy is kept a secret, and merely because the conspirators take steps to bury their traces, in order to avoid detection and punishment after the central criminal purpose has been accomplished. 353 U.S. 404.

Once again, as in *Toussie,* this Court rejected the Government's argument for extending Section 3282's clear limitations period. The decision of the Court of Appeals in this case also opens the same floodgates of criminal conspiracy prosecution warned against in *Grunewald* by extending the conspiracy limitations period. More soberingly, the floodgates opened by the Court of Appeals' decision cannot on any principled basis be confined solely to conspiracy prosecutions. Instead, the flood washes over all criminal prosecutions subject to Section 3282's limitations period.

In sum, *Grunewald, Fiswick* and *Brown* are clear: the commencement point for calculation of the Section 3282 limitations period for criminal conspiracy prosecutions is the date of the last overt act and not, as the Court of Appeals held, the day after the last overt act, or conspiracy's end.

D. *Burnet v. Willingham Loan & Trust Company: Conflicting, Controlling or Consistent With Section 3282?*

The decision of the Eleventh Circuit and the Second Circuit decision on which it relies cite *Burnet v. Willingham Loan &*

Trust Company, 282 U.S. 437 (1931) as their sole authority. *Burnet,* however, for the reasons set forth below, does not in fact support these decisions.

Burnet interpreted the limitations period for the assessment of income tax. At issue were the "civil" limitations period of the Revenue Act of 1918 which required the amount of tax due to be assessed "within five years after the return was due or was made," and the Revenue Act of 1921, requiring the assessment to be "within four years after the return was filed." Speaking for the Court, Mr. Justice Holmes held that the assessment period did not commence until the day after the return was filed:

> We are seeking a measure of time, and therefore we have to translate the event into the language of time; and when, as here, there is no special reason for being more precise, the day is the unit, because people generally measure periods of more than one day by days, months or years. When we say "four years after the return was filed," by common usage, we think of four years after the day on which the return was filed and it would seem that Congress was following common usage. 282 U.S. 439.

The first and obvious distinction between *Burnet* and the present case is the statutory scheme construed: *Burnet* is limited to the Revenue Act, not Section 3282. Further, and most significantly, the Revenue Acts of 1918 and 1921 provided internal, facial evidence of Congressional intent that the limitations period begin the day after the return was filed:

> The earlier act read "after the return was due or was made." The return was not due before the end of the day for filing. By Section 250 (d) of the Revenue Acts of 1918 and 1921 no suits shall be begun "after the expiration of five years after the date when such return was filed," obviously treating the "date" and the filing as making the same starting point, and "date" equally plainly meaning the year and day of the month. *Id.*

In *Burnet,* then, the evidence of Congressional intent on the face of the statute weighed in favor of the result. Also, apparently the Revenue Acts contained no clause prohibiting the

extension of the limitations period. Unlike the Revenue Acts, however, Section 3282 not only does not hint at a Congressional intent to run the limitations period from the day after the offense was committed, but instead expressly forbids extending the limitations period beyond that stated in the statute: the commission of the offense.

Further, in light of the statutory scheme of the Revenue Acts in *Burnet*, the result reached by the *Burnet* Court is in a sense consistent with and supportive of Petitioner's present argument. The Revenue Acts provided that the "return was not due before the end of the day for filing;" thus, in this particular scheme the limitations period could not begin to run until the day after filing, the point in time at which the event was complete. However, as *Fiswick* and *Brown* hold, a criminal conspiracy is "complete" for limitations purposes on the date of the last overt act, the point in time at which the crime is "complete". There is no reason, as in *Burnet*, to extend the conspiracy completion point a further day to allow for an already obtained completion of the event or offense. If read as turning on the date of completion of the event, *Burnet* is consistent with commencing Section 3282's limitation period on the date of the last overt act of the conspiracy, the date the offense is completed, and not the day after completion.

Burnet is further limited not only by the dissimilar statutes construed, but by its "civil" setting. Contrary to the Eleventh Circuit's assertion, *Burnet* has not been routinely applied by the lower federal courts in both civil and criminal cases. Instead, *Burnet* is unique for the scarcity of cases following it, and the lack of any cases extending or applying *Burnet* outside the context of tax prosecutions. *United States v. Mahler*, 181 F.Supp. 900, 903 (S.D.N.Y. 1960), cited by both the Eleventh and the Second Circuits, involved a prosecution for willful tax evasion, based on failure to file a return. *Mahler* thus presents a likely context for the application of the *Burnet* date of filing an income tax return rule. Of the two cases cited by the Second Circuit in *Guerro*, one, *Wiggins v. United States*, 64 F.2d 950, 950-51 (9th Cir. 1933), is again an income tax evasion case,

and the other, *United States v. Schwenoha*, 383 F.2d 395, 396 (2d Cir. 1967), involved a Securities Act fraud prosecution, with *Burnet* mentioned only in dicta. There are no cases of the lower federal courts, save *Guerro* and the present case, misapplying the *Burnet* rule out of context to a criminal prosecution, of whatever nature, governed by Section 3282's explicit limitations period.

To repeat for emphasis, the suggestion of a "general rule" that *Burnet* applies to both civil and criminal litigation alluded to by the Second and Eleventh Circuits simply does not exist. Instead, *Burnet* has been sparingly followed in both the civil and criminal context in the lower federal courts, rarely outside the tax context and never in the Section 3282 context.[4] Tellingly, none of this Court's decisions involving Section 3282 refer to *Burnet* or so compute the limitations period. Instead, *Grunewald*, *Fiswick* and *Brown* are to the contrary.

In sum, there is simply no evidence in the opinions of the lower federal courts or this Court to support a claim that *Burnet* has been applied wholesale in determining the commencement date of a limitations period.

Again distinguishing *Burnet* from the present case is the lack of the important policy considerations concerning criminal limitations periods enunciated in *Toussie* and conspiracy prosecutions as found in *Grunewald*. *Burnet* might well have a different result were that to be the case.

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[4]In *United States v. Guerro, supra*, the Second Circuit purports to follow the *Burnet* rule as applied to a criminal conspiracy prosecution by the Fifth Circuit in *United States v. Davis*, 533 F.2d 921 (1976). *Davis* does not support such a claim. First, *Davis* at no point cites or mentions *Burnet*. Second, the language quoted by the Second Circuit in *Davis*, that "in order to convict the government must have alleged and proved an overt act in furtherance of the conspiracy occurring on or after September 5, 1969, and thus within five years prior to the return date of the indictment," 694 F.2d at 903, *quoting* 533 F.2d at 926, is followed by this language: "only two of the eight overt acts set forth in the indictment were alleged as occurring *after* September 5, 1969, and within the five-year period of limitations." *Id.* Thus, the *Davis* "analysis" followed by the Second Circuit is, at best, dictum and at worst contradicted by the opinion itself. *Davis* provides no support for the decision in this case and is not an example of an application of the *Burnet* rule to a criminal prosecution.

Finally, even assuming *arguendo* that despite its factually and statutorily peculiar context, *Burnet* was to be applied across the board to all civil and criminal actions, *Burnet* itself admits of exception to its broadsweeping, general rule: "when, as here, there is no special reason for being precise." Section 3282, the *Toussie* principles of construction of a criminal limitations period, the *Grunewald* limitations on broadening criminal conspiracy prosecutions, and the *Fiswick* and *Brown* computation method are all special reasons in this case for being precise as to the exact event triggering the limitations period. Congress' express intent in Section 3282 is special reason enough.

E. *Reasons for Granting the Writ as to this Issue*

The Petition for Writ of Certiorari as to this issue should be granted by this Court for two reasons. First, the decision of the Court of Appeals is plainly and palpably wrong. It stands in direct contrast with the plain language of Section 3282 and the *Toussie* Court's construction of that language. Criminal limitations statutes are to be liberally interpreted in favor of repose, and Congress has declared a policy that Section 3282's limitations period is not to be extended " (e) xcept as otherwise expressly provided by law." The result reached by the Court of Appeals in commencing the limitations period the day after the last overt act of the conspiracy or the day after the last day a non-overt act conspiracy is in existence does violence to these precepts. Further, the Court of Appeals' decision impermissibly opens the floodgates through the statute of limitations to the already pervasive and wide-sweeping net of criminal conspiracy prosecutions. The result reached by the Eleventh Circuit wrenches beyond recognition the plain computational language of Section 3282, "after such offense shall have been committed," and is in stark contrast to the computational formulas for Section 3282 employed by this Court in *Grunewald, Fiswick* and *Brown*. Finally, the result reached by the Court of Appeals is not supported or compelled by any decision of the lower federal courts or this Court. In sum, the Writ of

Certiorari should issue in this case to correct the error of the Court of Appeals and reconcile the decision with controlling precedent of this Court and the plain meaning of the statute.

Second, and most significantly, the ramifications of the Court of Appeals' holding reach far beyond the present case. As already noted, the decision greatly extends the applications of the *Burnet* rule beyond existing law. If confined solely to conspiracy prosecutions, the anomaly arises that the Section 3282 limitations period would be one day longer for the conspiracy offense than for the substantive offense. For example, the Section 3282 period for mail fraud is commenced with the date of the last mailing, which date is included in the limitations period.[5] Under the Court of Appeals' holding, however, a prosecution for conspiracy to commit mail fraud, based on the same mailing, would have the same Section 3282 period commence on the day after the last mailing. The limitations period for the substantive offense would thus be five years; that for the conspiracy to commit the substantive offense, five years and one day. This result is prohibited by this Court's holding in *Bridges v. United States,* 346 U.S. 209 (1953), and by Section 3282's failure to single out the conspiracy offense as deserving of special treatment.

Further, there is no principled basis for limiting the Court of Appeals' decision solely to conspiracy cases. A wholesale application of *Burnet* to criminal prosecutions would affect all of the non-capital offenses covered by Section 3282. This addition of one extra day to the wide gamut of all federal non-capital prosecutions' limitations period is not compelled, but in fact prohibited, by existing precedent and statute. It would further unsettle the previous bright line rule found in the statute concerning when the limitations period commences. Further, the length of a limitations period for an offense should never fortuitously depend on the Circuit in which the prosecution is brought. The repercussions of accepting or adopting the

[5]*United States v. Clevenger,* 458 F.Supp. 354 (E.D.), holding that the Section 3282 period for mail fraud commences and includes the date of the mailing.

Eleventh Circuit Court of Appeals' decision is of national import, affects the federal limitations period throughout the Eleven Circuits, and as such, should be resolved by this Court for a uniform, national and principled rule.

In conclusion, Petitioner respectfully prays that this Court will grant his Petition for Writ of Certiorari to the Eleventh Circuit Court of Appeals as to this issue.

2. The Decision of the Court of Appeals Is In Direct Conflict with This Court's Precedent Concerning the Requisite Elements for Criminal Conspiracy and Greatly Broadens Existing Conspiracy Law

The Court of Appeals' decision, with one significant exception,[6] accurately summarized the only evidence produced by the Government at trial as to Petitioner's alleged involvement in the charged conspiracies:

> *The evidence as to Donnie Waites is less compelling.* Bosarge testified that Waites had come to the Rod and Reel on several occasions and was able to identify Waites at trial. Waites himself, as well as other co-conspirators, allegedly told Bosarge that he was going to fly over the boat when it came in through the Yucatan. Bosarge further testified that he had first met Waites at Butler's house before the purchase of the Rod and Reel and that Bosarge, Waites, and others went out on another co-conspirator's boat, and that Bosarge showed how to get into the fish camp from the waterways. [NOTE: The following sentences are the clearly erroneous parts of the Panel Opinion, further detailed hereafter.] A member of the original crew of the MORNING STAR arrested in 1979 testified that he had met Waites prior to the arrest and was told that he would be flying over the boat as cover. The co-conspirator saw an airplane early on the morning of the

[6]At trial, the United States Attorney asked a convicted "crewmember", Patrick Ennis: "Let me ask you if you see Donnie in the courtroom now that you have been here awhile?" Ennis responded, *"No, I don't."* (Transcript 492). Therefore, the "Don" or "Donny," last name unknown, who Ennis had met on several occasions, and who he had heard was supposed to fly cover for the boat, was *not* the Petitioner, who had been present in the courtroom throughout the trial and during Ennis' testimony.

arrest and once it became daylight, saw the same plane circling overhead. The co-conspirator had previously described Waites, and the jury was able to evaluate this description because counsel had Waites stand up during the closing argument for comparative purposes.

. . . (I)t was never established whether the plane flying above the MORNING STAR was acting as a spotter for the MORNING STAR, or whether WAITES was in that plane . . . 792 F.2d 1528, at 1536. (Emphasis supplied)

In affirming Petitioner's convictions for conspiracy to possess, distribute (Count Two), and import (Count One) marijuana, the Court of Appeals broadened the scope of criminal conspiracy prosecutions beyond the limits set by this Court and that required by fundamental fairness. As a minimum for criminal conspiracy liability, this Court has required that the Government prove an alleged conspirator's *"participation"* in the conspiracy. In effect, the Court of Appeals' decision rewrites conspiracy law to dispose of the *"participation"* requirement, by allowing convictions based on the piling of inferences upon inferences unsupported by the evidence. The Writ of Certiorari should be granted as to this issue to clarify, delineate and narrow the participation requirement for criminal conspiracy liability.

A. *In re Coy to Ingram: Controlling principles of Criminal Conspiracy Liability*

In Re Coy, 127 U.S. 731, 735 (1888), *quoted in United States v. Feola,* 420 U.S. 671, 688 (1975), sets forth the unexceptionable principle that for individual liability to attach, conspirators must agree to participate in the prohibited conduct. Both an agreement *and* participation must be proved by the Government. Of course, due to the secret nature of a conspiracy, circumstantial evidence alone may suffice to show both the agreement and an individual's participation. *See Blumenthal v. United States,* 332 U.S. 539 (1947).

Although no case of this Court has turned on the "participation" element for a criminal conspiracy, several cases are in-

structive as to the threshold quantum of participation required for a conspiracy conviction. *Paoli v. United States,* 352 U.S. 232 (1957), affirmed a conviction for conspiracy to transport alcohol in unstamped containers and evade payment of federal taxes. Petitioner Paoli was a relatively minor participant in the scheme, and:

> Petitioner contends that the . . . evidence shows merely that he was a friend and associate of Pierro and Margiasso. We conclude, however, from the record as a whole, that the jury could find, beyond a reasonable doubt, that petitioner was associated with Pierro and Margiasso in the purchase of the garage and the use of the panel truck, that he knew that unstampel alcohol was stored in the garage, that he had access to it *and that he was an active participant in the transfers of alcohol to Whitley and King.* 352 U.S. 236. (Emphasis supplied).

Certainly, Paoli's active, personal participation in the scheme was sufficient to permit the imposition of just conspiracy liability.

Agnello v. United States, 269 U.S. 20 (1925), involved a conspiracy to sell cocaine without registering or paying tax. Although the case turned on the legality of the search of Agnello's home and the seizure of contraband there, issues requiring reversal of Agnello's conviction, this Court briefly reviewed Agnello's contention that the evidence was not sufficient to prove his knowing participation in the conspiracy:

> The packages of cocaine seized at Alba's house were carried to that place by Frank Agnello. He did this at the instance of Centorino; and in his behalf it is claimed he acted innocently and without knowledge of the contents of the package. The evidence of the search and seizure made in his house tended to show that he knew what he was doing and was a willing participant in the conspiracy charged. 269 U.S. 35.

Actual participation in delivery of the drug, plus evidence linking the petitioner with the drug conspiracy, was sufficient to demonstrate the willing participation required for liability.

Paoli and *Agnello* set the apex of the evidence of participa-

tion logically necessary to support criminal conspiracy liability: active, direct, willing, personal participation in the scheme will suffice.

Direct Sales Company v. United States, 319 U.S. 703 (1943), explores the lower end of this quantum of evidence spectrum. Direct Sales Company was a mail order pharmaceutical company, charged with conspiring with physicians to violate the Narcotics Act. *Direct Sales* relied on *United States v. Falcone,* 311 U.S. 205 (1940), for its argument that a supplier does not knowingly participate in a conspiracy with the buyer without proof of knowledge of the buyer's illegal uses. Pertinent to the present issue, this Court stated:

> The commodities sold (in *Falcone*) were articles of free commerce, sugar, cans, etc. They were not restricted as to sale by order form, registration, or other requirements.
>
> * * *
>
> This difference is important for two purposes. One is for making certain that the seller knows the buyer's intended illegal use. The other is to show that by the sale he intends to further, promote and cooperate in it. This intent, when given effect by overt act, is the gist of conspiracy. While it is not identical with mere knowledge that another purposes unlawful action, it is not unrelated to such knowledge. Without the knowledge, the intent cannot exist. . . . Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal. . . . *This, because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning what [in Falcone] was called a dragnet to draw in all substantive crimes.* 319 U.S. 711 (Emphasis supplied) (citation omitted).

This Court further found that:

> When the evidence discloses such a system, working in prolonged cooperation with a physician's unlawful purpose to supply him with his stock in trade for his illicit enterprise, there is no legal obstacle to finding that the supplier not only knows and acquiesces, but joins both hand and mind with him to make his accomplishment possible. The step

> from knowledge to intent and agreement may be taken. There is more than suspicion, more than knowledge, acquiescence, carelessness, indifference, lack of concern. *There is informed and interested cooperation, stimulation, instigation.* And there is also a "stake in the venture" which, even if it may not be substantial, is not irrelevant to the question of conspiracy. Petitioner's stake here was in making the profits which it knew could only come from its encouragement of Tate's illicit operation. In such a posture the case does not fall doubtfully outside either the shadowy border between lawful cooperation and criminal association or the no less elusive line which separates conspiracy from overlapping forms of criminal cooperation. *Id.* at 713 (Emphasis supplied).

Such informed and interested cooperation, stimulation and instigation will support knowing participation in a criminal conspiracy. Such evidence, however, must consist of more than the mere piling of inference upon inference. No such clear evidence exists in the case at bar.

Following *Direct Sales*, this Court in *Ingram v. United States*, 360 U.S. 672 (1959) reversed the convictions of two clerical employees charged with conspiracy to defeat payment of taxes on an illegal lottery operation due to the lack of evidence that they knew the principals were liable for and had not paid federal taxes.

> But the fact that payment of federal taxes by Ingram and Jenkins [lottery operators] might have resulted in disclosure of the lottery and subsequent prosecution of Smith and Law [clerical employees] by local authorities would permit an inference that concealment of the lottery was motivated by a purpose to evade payment of federal taxes *only if, independently,* there were proof that Smith and Law knew of the tax liability. Evidence that Smith and Law might have wanted the taxes to be evaded if they had known of them, and that they engaged in conduct which could have been in furtherance of a plan to evade taxes if they had known of them, is not evidence that they did know of them. 360 U.S. 680 (Emphasis supplied).

Ingram thus explicates the low range of the quantum of knowledge and participation evidence spectrum: inferences alone,

absent independent proof, will not support a conspiracy conviction.

These cases are instructive, and in the case in point of *Ingram* controlling, as to the present issue. Of course, agreement, knowledge and participation requisite for a conspiracy are often intertwined and manifested by the same course of conduct. The highwater mark of that criminalized course of conduct is active, direct, willing participation in the illicit scheme. Further, at an ebb, interested and willing cooperation, instigation and stimulation will suffice. At the low tide mark, inferences as to knowledge, agreement and participation, absent independent proof of these essential elements, will not support a conviction.

Petitioner submits that the decision of the Eleventh Circuit Court of Appeals transgresses these principles: no evidence, apart from the unwarranted piling of inferences upon inferences, unsupported by independent proof, supports a finding of Petitioner's knowing participation in either conspiracy. The Government has never argued the existence of any evidence to support his conviction on the conspiracy to possess/distribute charge in Count Two. Without digressing to argue other factual insufficiencies, the uncontroverted lack of evidence as to Count Two underscores the absence of his asserted "participation" in any other regard.

B. *Reason for Granting the Writ*

A review of the Eleventh Circuit's factual basis, even with the noted critical errors finds the evidence is clearly insufficient to sustain Petitioner's convictions on either Count. The chief witness, a paid and "forgiven" criminal, recalled Petitioner being at the fish camp and thus in association with some of the people apparently preparing for a load of contraband. At worst, Bosarge said that he understood Petitioner was "supposed to" fly over the boat when it came through the Yucatan. A crew member of the MORNING STAR, Patrick Ennis, testified that an airplane flew overhead and circled the boat on the

day of the arrest. *Contrary* to the Eleventh Circuit Opinion, Ennis did *not* "identify" Petitioner as *the* person he had been told would be flying over the boat as cover. But, even if so "identified", a conspiracy has not been made out. For, as the Court of Appeals succinctly found, *"it was never established whether the plane flying above the MORNING STAR was acting as a spotter for the MORNING STAR, or whether [Petitioner] Waites was in that plane."*

Patrick Ennis was a member of the "crew" arrested on the MORNING STAR. He had substantial first-hand knowledge of the "players". Mr. Ennis had met a "Don" or "Donny", last name unknown, on several occasions. It was *this* person he had met — *not* Petitioner Waites — that was supposed to be flying over the boat. Unlike Bosarge, Ennis' testimony was unimpeached and unrehearsed. *He did not* "identify" Petitioner Waites as indicated by the Eleventh Circuit's Opinion. In fact, having testified at length with Petitioner Waites in the courtroom, this knowledgeable and critical witness responded to the re-cross examination of the United States Attorney Jefferson B. Sessions III:

> MR. SESSIONS: Have you had occasion to — well, let me ask you this, you have given some description of Donny. Let me ask you to give — let me ask you if you see Donny in the courtroom now that you have been here awhile?
>
> MR. ENNIS: *No, I don't.* (T.492). (Emphasis supplied).

Mr. Ennis had met a "Donny" at the docks. (T.475). That "Donny" and a few others were in Bayou La Batre and went to New Orleans to arrange for a lawyer in advance. (T.482-483). Mr. Ennis, the captain, Rick LeFlair, and others discussed the "dangers" of being caught. *That* "Donny" — *not* Petitioner Waites — was supposed to have been in "an airplane . . . flying cover for us, to let us know whether we could come through or not." (T.484).

Bosarge admitted that the "Don" or "Donny" he had met was *"supposed to be"* in an airplane flying over. Most importantly, while subjected to lengthy "debriefings", Bosarge had

never been able to give even a description of the person he knew as "Don", "Danny", or "Donny" prior to coming to Court. This uncontroverted fact found him being brought into the courtroom after being shown Petitioner's photograph and being told "the Donny" would be there. Understandably, he ultimately pointed to Petitioner as a culpable party since he had numerous contacts with the other two defendants on trial. Even this poisoned "identification" established, at worst, that this person was "*supposed to have been* in [the airplane flying cover for the boat]." (T.352) (Emphasis supplied). This state of facts is the only evidence available to support the Eleventh Circuit's affirmance of Petitioner's conviction, while noting that *"the evidence as to [Petitioner] Donnie Waites is less compelling."* (Panel Opinion at p. 4179). (Emphasis supplied).

Although perhaps unnecessary, Petitioner asks this Court's indulgence of a brief understanding of Bosarge's background. Bosarge had been involved with smuggling marijuana for years. He began to "cooperate" with the government in 1982 when he was in Louisiana state jail for a stolen boat (T.348-351). He initially lied to Customs Patrol Officer Harold Parker about this matter. (T.348). When the state threatened him with three (3) years to serve, he struck a deal — "they said I wouldn't get no time and they would try to help me." (T.360). Ultimately, all of his sins were "forgiven."

Bosarge told the government about three (3) separate conspiracies with the F/V LADY HAMILTON, two with F/V MORNING STAR (this case and a prior matter), and one with F/V SURPRISE. Officer Parker and Bosarge acknowledged that through his "deal" he avoided over *one hundred (100) years* for conspiracy and substantive offenses (T.114, 361-366). In addition, he was allowed to keep $30,000 of illegal funds *and* was not prosecuted for tax evasion and/or failing to file tax returns. (T.366).

Bosarge was unable to read or write (T.298) making cross-examination extremely difficult. A review of his first lengthy interview (Appendix, D.E.A. Form #6), his Grand Jury testi-

mony, and trial testimony is riddled with inconsistencies and "changes." Bosarge "explained" this problem in various ways:

> A: I am not going to deny [making that statement]. If I made it, it was a mistake, because I have had the boat switched up. I have had so much going on that a lot of that is hard to keep straight. (T.326).
>
> * * *
>
> A: Well, if it was, I made a mistake or I was in a big hurry to go somewhere. These things are hard to keep straight. (T.329).
>
> * * *
>
> Q: It is like you said a few minutes ago, a lot of this is hard to keep straight, isn't it sir?
>
> A: Yes. (T.345-346).

Just in regard to such a simple fact as his first alleged meeting with "Donny", Bosarge testified at trial that he met with "Donny" *before* the purchase of the camp at Joe Butler's house. (T.324). He told the Grand Jury that it was *after* the purchase of the camp, he first met "Donny". (T.324). He told Officer Parker in January of 1983, that he first met "Donny" at Gulfport Harbor or Ocean Springs Harbor. (T.324-325).

"Donny's" alleged "role" in this scenario is confusing at best. In opening statement the government asserted that Petitioner was "supposed to be the one in charge of *flying the plane* so they can see the boats . . ." (T.37). (Emphasis supplied). But Bosarge said he met a Rick who was also a boat captain:

> A: [Rick] was going to fly and watch for the boat to come through the Yucatan.
>
> Q: Rick was?
>
> A: Yes. His destination was to go to Colombia to pick up a load.
>
> Q: What was Donny going to do?
>
> A: They was talking about an airplane that was going to fly over the boat. (T.296).

Bosarge then testified "Donny" said he was going to fly over the boat. (T.297). With all of these "contacts" with the

"Donny", Bosarge admitted his inability to even *describe* him when first introduced in 1983:

> Q: I will ask you if on the occasion, *January 14, 1983,* and at the time of the interview, that *you were not able to give a description* to Mr. Cliff Brown *of either Don,* last name unknown, *or Donny,* last name unknown?
>
> A: *That is right.* (T.352). (Emphasis supplied).

With regard to "Donny", all he could say was that "Donny was *supposed to have been in the airplane circling,*" but this was not known to him as a fact but just that *"he was supposed to have been in there."* (T.355) (Emphasis supplied).

Bosarge's "ability" to identify Petitioner in Court, notwithstanding his previous inability to even provide a rough description, was finally disclosed:

> Q: When did you first come to know or learn that [Petitioner's] last name to be Waites?
>
> A: Well, Cliff [D.E.A. Special Agent Cliff Brown] showed me some pictures, a folder or a bunch of pictures, and his picture was laying there.
>
> Q: And Mr. Brown told you that his name was Waites?
>
> A: I really didn't know until ya'll called it out in here.
>
> Q: Prior to coming into the courtroom yesterday afternoon around 4:00 o'clock, to begin your testimony, were you told that Donny would be in the courtroom . . .?
>
> A: Well, I heard they said that it would be Donny — everybody in here . . . .
>
> Q: But you expected Donny to be in the courtroom, did you not?
>
> A: Yes. (T.355-356).

During direct examination Bosarge said that "Donny" came to the camp a couple of times, and that he drove a silver Thunderbird. (T.206-207). On one occasion "Donny" supposedly came with his little boy and went out on co-conspirator Bobby Hoskin's boat which had been pulled by a black Bronco vehicle (T.208). *None* of this is born out by the numerous law enforcement officers who conducted surveillance.

The first four witnesses were Customs or other investigative officers. From June 6 to July 12, 1979, these witnesses and numerous other officers kept the "Rod and Reel Fish Camp" under constant surveillance until they saw the apparent "offloading crew" leave the camp in a hurry. They later learned that the Coast Guard had "busted" the load of marijuana. This was not a "joint investigation" – rather, the Coast Guard was operating wholly independent of the Customs and other officers who had maintained surveillance for over six weeks.

The cumulative effect of the testimony of these representatives of the surveillance "team" is that *they never saw Petitioner* or any vehicle associated with Petitioner at the camp described by Bosarge as the "meeting place" and the intended "offloading site." These officers and others did testify they saw a Rod Wayne Ellis, co-conspirators Hoskins, Waldrop, and Butler, and several other named individuals. Former Customs Patrol Officer Cecil Miller testified that although their sole purpose was to monitor the traffic in and around the camp, he did not know (T.73), and could not identify Petitioner as ever being in the area (T.78-79). Neither could Customs Patrol Officer Harold Parker (T.81-81).

Witness Mildred Rocco and her daughter, Vonda Ross, lived in Biloxi, Mississippi, and went to the camp at Ocean Springs on several occasions with Bosarge. They recalled seeing Joe Butler and several others there, but *not* Petitioner (T.428-457). They saw the trucks and "offloading crew" leave before the boat's seizure. (T.718).

In short, there is a total absence of any independent evidence that Petitioner knowingly participated in the charged conspiracies. Only Bosarge's, a paid Government witness, testimony that Petitioner and other conspirators told him Petitioner would fly over the boat is present to tenuously support the inferences that: (1) the plane seen was in fact a spotter for the boat, and (2) Petitioner was in the plane, participating as a spotter. As to the first inference, no evidence was introduced to make it more likely than not that the plane was a spotter or was somehow connected with the boat. Surely, many planes of

many types and purposes could fly over the Yucatan. No evidence was adduced as to the type or model of the airplane, its flight plan or pattern or the identification of the plane that Bosarge or Ennis had been told would be over the boat. Thus, this first inference falls far short of the quantum of proof required, and no independent evidence connecting the plane to the activities of the boat is present. The second inference piled on the first unwarranted inference that the plane was connected to the boat is likewise fallacious and unsupported by independent evidence. No evidence was adduced at trial that Petitioner owned a plane, could fly a plane, was in a plane on the morning of the arrest, was near the Yucatan that day, ever discussed the possession, distribution or importation of marijuana with the conspirators, or knew that the MORNING STAR was loaded with marijuana. Since there was no independent proof of knowing participation by the Petitioner in the conspiracy to confirm Bosarge's allegation that Petitioner was to be in a plane over the boat, *Ingram* mandates that the convictions cannot stand. Charges of conspiracy are not to be made out by piling such tenuous inferences upon inferences, thus fashioning a dragnet to draw in all substantive crimes. *Direct Sales,* 319 U.S. 711. This case marks the low tide point of the quantum of evidence for knowing participation in a conspiracy and convictions based on such a piling of inferences, absent proof of individual action and liability, are indeed little more than a dragnet for those who may have associated with conspirators.

Further, beyond the facts and parties involved, the decision of the Court of Appeals in this case stretches the already wide-flung net of conspiracy prosecutions beyond recognizable and acceptable limits. Although the conspiracy prosecution is an arrow in the quiver of the prosecutor, the Court of Appeals' decision turns this arrow into a nuclear bomb. Petitioner was caught in the fallout. As Mr. Justice Jackson, concurring in *Krulewitch v. United States,* 336 U.S. 440, 445-46 (1949), said:

> This case illustrates a present drift in the federal law of conspiracy which warrants some further comment because

> it is characteristic of the long evolution of that elastic, sprawling and pervasive offense. Its history exemplifies the "tendency of a principle to expand itself to the limit of its logic." The unavailing protest of courts against the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself, or in addition thereto, suggests that loose practice as to this offense constitutes a serious threat to fairness in our administration of justice.

And equally pertinent to the present case, Mr. Justice Jackson wrote:

> There is, of course, strong temptation to relax rigid standards when it seems the only way to sustain convictions of evildoers. But statutes authorize prosecution for substantive crimes for most evil doing without the dangers to the liberty of the individual and the integrity of the judicial process that are inherent in conspiracy charges. We should disapprove the doctrine of implied or constructive crime in its entirety and in every manifestation. And I think there should be no straining to uphold any conspiracy conviction where prosecution for the substantive offense is adequate and the purpose served by adding the conspiracy charge seems chiefly to get procedural advantages to ease the way to conviction.
>
> * * *
>
> (I) t is better that the crime go unwhipped of justice than that this theory of implied continuance of conspiracy find lodgment in our law, either by affirmance or tolerance. Few instruments of injustice can equal that of implied or presumed or constructive crimes. The most odious of all oppressions are those which mask as justice. *Id.* at 457-58.

The drift signalled by the Eleventh Circuit Court of Appeals' decision in this case to indiscriminately affirm conspiracy convictions based on unsubstantiated inferences piled on inferences and without proof of the essential elements of a conspiracy of knowledge and participation should not find lodgment in our law, either by affirmance or tolerance. Due to the conflict with controlling and instructive precedent of this Court and the broadsweeping implications for all federal conspiracy prosecutions, this Court should grant the Writ as to this issue.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Judgment and Opinion of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF ALABAMA

UNITED STATES OF AMERICA	*	
	*	
v.	*	CRIMINAL NO.
	*	[84-00081]
JOE B. BUTLER;	*	
DAVID R. HOLMES;	*	
PATRICK C. WALDROP;	*	
DONNIE WAITES;	*	
ROBERT M. HOSKINS;	*	
BLAKE, whose full or true name	*	
is otherwise unknown to the	*	
Grand Jury, being a white male	*	
approximately five feet, eight inches	*	
tall, weighing approximately 145	*	
pounds, having black hair, and	*	
whose present age is approximately	*	
37 years; and SCOTT, whose full	*	
or true name is otherwise unknown	*	
to the Grand Jury, being a white	*	
male approximately six feet, four	*	
inches tall weighing approximately	*	
250 pounds and having light brown	*	
hair, approximately 44 years of age	*	

The Grand Jury charges:

COUNT ONE

From a date prior to July 14, 1979, the exact date being unknown to the Grand Jury, and continuing thereafter until July 14, 1979, in Colombia, South America, on the high seas and in the State of Mississippi, and within the special maritime and territorial jurisdiction of the United States and in Mobile County, within the Southern Division of the Southern District of Alabama, and within the jurisdiction of this Court, JOE B.

BUTLER, DAVID R. HOLMES, PATRICK C. WALDROP, DONNIE WAITES, ROBERT M. HOSKINS, BLAKE, whose full or true name is otherwise unknown to the Grand Jury, being a white male approximately five feet, eight inches tall, weighing approximately 145 pounds, having black hair and whose present age is approximately 37 years, and SCOTT, whose full or true name is otherwise unknown to the Grand Jury, being a white male approximately six feet, four inches tall, weighing approximately 250 pounds and having light brown hair, approximately 44 years of age, did wilfully, knowingly and unlawfully combine, conspire, confederate and agree together and with each other, and with divers other persons whose names are to the Grand Jury known and unknown, to commit certain offenses against the United States of America, to-wit:

(a) To knowingly and intentionally import approximately twenty-five thousand and one hundred eighty (25,180) pounds of marijuana, a Schedule I controlled substance, into the United States of America from Colombia, South America, contrary to Title 21, United States Code, Section 952 (a) .

It was a part of said conspiracy that the defendants would and did cause a large quantity of marijuana to be loaded aboard the vessel F/V MORNING STAR and obtained a crew to operate said vessel; that said vessel had as its final destination the United States of America; and it was further a part of said conspiracy that the aforesaid large quantity of marijuana would be imported into the United States by means of said vessel but prior to consummation of the importation, the vessel F/V MORNING STAR was intercepted by United States Coast Guard officials and taken into custody while on the high seas, and thereafter brought to Mobile County in the Southern Division of the Southern District of Alabama, that being the first port of entry into the United States to which said vessel was first brought, all in violation of Title 21, United States Code, Section 963, and Title 18, United States Code, Section 2.

COUNT TWO

From a date prior to July 14, 1979, the exact date being unknown to the Grand Jury, and continuing thereafter until July 14, 1979, in Colombia, South America, on the high seas and in the State of Mississippi, and within the special maritime and territorial jurisdiction of the United States and in Mobile County, within the Southern Division of the Southern District of Alabama, and within the jurisdiction of this Court, JOE B. BUTLER, DAVID R. HOLMES, PATRICK C. WALDROP, DONNIE WAITES, ROBERT M. HOSKINS, BLAKE, whose full or true name is otherwise unknown to the Grand Jury, being a white male approximately five feet, eight inches tall, weighing approximately 145 pounds, having black hair and whose present age is approximately 37 years, and SCOTT, whose full or true name is otherwise unknown to the Grand Jury, being a white male approximately six feet, four inches tall, weighing approximately 250 pounds and having light brown hair, approximately 44 years of age, did wilfully, knowingly and unlawfully combine, conspire, confederate and agree together and with each other, and with divers other persons whose names are to the Grand Jury known and unknown, to commit certain offenses against the United States of America, to-wit:

(a) To knowingly and intentionally unlawfully distribute and possess with intent to distribute approximately twenty-five thousand and one hundred eighty (25,180) pounds of marijuana, a Schedule I controlled substance, in violation of Title 21, United States Code, Section 841 (a) (1).

It was a part of said conspiracy that the defendants would and did cause a large quantity of marijuana to be loaded aboard the vessel F/V MORNING STAR and obtained a crew to operate said vessel; that said vessel had as its final destination the United States of America; and it was further a part of said conspiracy that the aforesaid large quantity of marijuana would be imported into the United States by means of said vessel but prior to consummation of the importation, the vessel

F/V MORNING STAR was intercepted by United States Coast Guard officials and taken into custody while on the high seas, and thereafter brought to Mobile County in the Southern Division of the Southern District of Alabama, that being the first port of entry into the United States to which said vessel was first brought, all in violation of Title 21, United States Code, Section 963, and Title 18, United States Code, Section 2.

A TRUE BILL

/s/ DAVE L. PATTON

Foreman, United States Grand Jury, Southern District of Alabama

/s/ J. B. SESSIONS, III

J. B. Sessions, III
United States Attorney

JULY, 1984

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
CR. 84-00081

DONNIE WAITES, Defendant

JUDGMENT AND PROBATION/COMMITMENT ORDER

February 22, 1985

There being a verdict of guilty. Defendant has been convicted as charged of the offense (s) of violation of Section 963, Title 21, U.S. Code as charged in Counts 1 & 2 of the indictment.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted.

IT IS ADJUDGED on Count 1 that the defendant be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE (5) YEARS with this sentence to run concurrent with the sentence imposed on Count 2.

IT IS FURTHER ADJUDGED on Count 1 that the defendant pay a fine to the United States in the sum of $5,000.00.

IT IS ADJUDGED on Count 2 that the defendant be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE (5) YEARS with this sentence to run concurrent with the sentence imposed on Count 1.

IT IS FURTHER ADJUDGED on Count 2 that the defendant pay a fine to the United States in the sum of $5,000.00.

The defendant may voluntarily surrender to the institution designated by the Bureau of Prisons, and shall voluntarily surrender when informed by the U. S. Marshal's Office as to when and where to surrender.

The court orders commitment to the custody of the Attorney General and recommends that the defendant be committed to a minimum security institution.

/s/ EMMETT R. COX
U.S. District Judge

February 22, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

UNITED STATES OF AMERICA,	*	
vs.	*	CASE NUMBER:
DAVID R. HOLMES and	*	84-00081
DONNIE WAITES,	*	
Defendants.	*	

This cause coming on to be heard for sentencing before the Honorable Emmett R. Cox, United States District Judge for the Southern District of Alabama, on the 22nd day of February, 1985, commencing at approximately 1:30 P.M., wherein, the following occurred:

APPEARANCES

FOR THE GOVERNMENT: Gloria Bedwell, Assistant
United States Attorney
United States Courthouse
Mobile, Alabama

FOR DAVID R. HOLMES: Hess, Atchison & Horne
Attorneys at Law
301 St. Joseph Street
Mobile, Alabama
By: Barry Hess, Esquire

FOR DONNIE WAITES: Groenendyke & Salter
Attorneys at Law
2205 Morris Avenue
Birmingham, Alabama 35203
By: J. Stephen Salter, Esquire
Linda T. Cuddy
Court Reporter

* * *

[T.791-793] THE COURT:

Based on the information which you have, are there any errors in it?

MR. SALTER:

There's one minor error, Your Honor, and that is I think on the facing page, and I think perhaps on page five, it reflects the Defendant's bond as a hundred thousand dollar surety bond. It's not a surety bond. It's perhaps an insignificant matter, but I believe it's a personal bond.

The other exception to it is, as I first mentioned, is the characterization of Mr. Waites' role in the matter.

THE COURT:

Let's get specific about that. Do you have a copy of the report before you?

MR. SALTER:

No. I don't have a copy of the report before me, Your Honor. I am familiar with it. I would at this time, if I could, if it please the Court, provide the Court with a copy of a certified — copy of what is known as a record of diligent search prepared by the Federal Aviation Administration. I've given a copy to Ms. Bedwell. I had one of those prepared on behalf of Mr. Waites, as well as one on behalf of Mr. Waldrop. It's my recollection that it's the Government's theory in the case that Mr. Waites was a pilot or somehow being involved with a plane in connection with the activities which I guess would be described as being in the nature of a lookout. I simply wanted to provide that information and I believe, in talking to Ms. Bedwell, the Government does not take the position that he was, in fact, a pilot in that aircraft.

I'm not clear as to what the evidence may have shown as to what his role is supposed to be in regard to a lookout or being involved in an airplane. That is to say, in the closing argument of Mr. Sessions, the reason Mr. Waites was never seen and no one had seen him around doing much of anything was

because he was one of the shadow men. Mr. Sessions' remark was in the closing argument something to the effect, the reason Mr. Waites was never seen was because he had skedaddled off somewhere to get some gasoline. Those both seem to be somewhat at odds or at variance with the theory that Mr. Waites was in the airplane and/or the pilot of an airplane. So I'm not certain what the position is with regard to Mr. Waites and what his role was supposed to be. The evidence did not find him being the pilot of an airplane, and we at least offer that for the Court's consideration in terms of his involvement, that he is not a pilot and has not been involved in any type of activities involving piloting people around or otherwise facilitating a conspiracy to smuggle marijuana.

* * *

THE COURT:

Tell me specifically, if you can, what it is in the presentence that you object to.

MR. SALTER:

The portion in the Government's version of the offense where Mr. Waites is characterized as being above Mr. Waldrop and Mr. Butler on page three — excuse me. On page four, it says in the fourth paragraph: "Investigating agents consider Defendant David Holmes to be in the higher echelon. Defendant Waites is next in the hierarchy, with Butler, Waldrop and Hoskins being in the middle level." We take exception to that and ask the Court to consider that there's no evidence to suggest that that was Mr. Waites' role.

* * *

[T.798] THE COURT:

Correct me if I'm wrong. My memory is not perfect, believe me, and I don't mind being corrected. My recollection is that, at least at some point in time, Mr. Bosarge testified that this man's role in this matter was to serve as a lookout or spotter in the aircraft which was to contact the MORNING STAR.

MS. BEDWELL:

I think that's what the evidence was for this case and the opinions.

* * *

[T.-799] MS. BEDWELL:

I think, again, Your Honor, we're confronted with what inferences or opinions or whatever you said before that the investigating officers have with regard to their knowledge of these other activities and his involvements with marijuana, and particularly the incident in Florida, plus the surveillance and other intelligence information that Mr. McElhaney provided during the time of trial. I think that we're going to be in the same position about this information as we are the one about Mr. Holmes.

THE COURT:

In other words, we're talking opinion and speculation. Is that what you're saying?

MS. BEDWELL:

Inference, if you will. Yes, sir. Same situation as Mr. Holmes.

THE COURT:

Is it fair to say that it's the position of the Government that his role in this matter, insofar as it is known, was to be the spotter or lookout in the aircraft?

MS. BEDWELL:

I would say insofar as is supported by the evidence that we put before the jury. . . .

* * *

[T.-800] THE COURT:

[T.-801] . . . But when we get down to this particular venture, insofar as we know what his position was — not merely having

evidence, but, insofar as we know, it's limited to being a spotter or lookout in the aircraft. Is that fair or not?

MS. BEDWELL:

Yes, sir.

THE COURT:

Well, what I'm going to do, Mr. Salter, is make a finding which will be appended to this report to the effect that that is the Government's position as to his role in this matter and that any suggestion that his role in the matter was in a hierarchy above that of Messrs. Butler's, Waldrop's, and Hoskins' are opinions or speculation, and not supported by any evidence that I'm aware of at this time.

Is there anything else in the presentence report?

* * *

UNITED STATES of America,
Plaintiff-Appellee,

v.

Joe B. BUTLER, David R. Holmes, Donnie Waites,
Defendants-Appellants.

No. 85-7021.

United States Court of Appeals,
Eleventh Circuit.

July 7, 1986.

Defendants were convicted in the United States District Court for the Southern District of Alabama, Emmett Ripley Cox, J., of conspiracy to import marijuana and conspiracy to possess marijuana with intent to distribute. Defendants appealed. The Court of Appeals, Hatchett, Circuit Judge, held that: (1) conspiracy continued until July 12, 1979, when vessel with marijuana aboard was boarded and seized, and following day, July 13, 1979, was first day in calculation of limitations period, so that indictment for conspiracy to import marijuana and conspiracy to possess marijuana with intent to distribute, filed on July 12, 1984, was timely; (2) denial of severance was not error; and (3) evidence was sufficient to support convictions.

Affirmed.

Appeals from the United States District Court for the Southern District of Alabama.

Before JOHNSON and HATCHETT, Circuit Judges, and ALAIMO*, Chief District Judge.

HATCHETT, Circuit Judge:

Appellants, Joe Butler, Donnie Waites, and David Holmes,

*Honorable Anthony A. Alaimo, Chief U.S. District Judge for the Southern District of Georgia, sitting by designation.

challenge their convictions for conspiracy to import marijuana, in violation of 21 U.S.C. § 963, and conspiracy to possess marijuana with intent to distribute, in violation of 21 U.S.C. § 846 on grounds involving introduction of evidence, severance, statute of limitations, and sufficiency of evidence. We affirm.

FACTS

On the morning of July 12, 1979, a United States Coast Guard cutter, on routine patrol in the Yucatan Straits, boarded the fishing vessel MORNING STAR. After discovering 25,000 pounds of marijuana on board, Coast Guard officers arrested the crew members. None of the appellants were aboard the vessel. An agent of the Drug Enforcement Administration recognized the name of one of the crew members as the same name in which a vehicle was registered which was under surveillance at the Rod and Reel Fish Camp (Rod and Reel) in Ocean Springs, Mississippi. Apparently, however, the government did not at that time conduct any substantial investigation of the link between the seizure of the MORNING STAR and the activities taking place at the Rod and Reel.

In 1982, after being arrested on unrelated charges, Robert Bosarge began providing the government information regarding various drug smuggling ventures. Bosarge, who was also involved in the MORNING STAR smuggling venture, provided the government with information which led to the indictment and arrest of the appellants. The indictment was filed on July 12, 1984, the fifth anniversary of the MORNING STAR seizure. At trial, Bosarge was the government's chief witness. The appellants were convicted on all counts of the indictment.

The appellants assert the following contentions: (1) that the government failed to commence action against them within the applicable statute of limitations; (2) that the government delayed instituting the proceedings in order to prejudice the appellants' defenses; (3) that the district court erred in failing to grant severances; and (4) that the district court erred in ad-

mitting certain evidence. Appellants Waites and Holmes also contend that insufficient evidence existed to support their convictions.

1. Statute of Limitations

The appellants' contentions regarding the statute of limitations may be summarized as follows: (1) The indictment was filed on July 12, 1984; therefore, the crimes charged must have occurred within the period between July 13, 1979, and July 12, 1984. (2) The indictment fails to state any date between July 13, 1979, and July 12, 1984, on which acts in furtherance of the conspiracy occurred. (3) The date of the last overt act in furtherance of the conspiracy was July 12, 1979; consequently, the indictment was filed one day late.

Title 18 U.S.C. § 3282 provides that unless otherwise expressly provided by law, no person shall be prosecuted for a non-capital offense "unless the indictment is found . . . within five years next after such offense shall have been committed." The appellants contend, and we find that the conspiracy was terminated on July 12, 1979, the date of the MORNING STAR seizure.

This issue is one of first impression in this circuit. Both parties have presented dictum in binding Fifth Circuit cases to support their contentions. In *United States v. Davis*, 533 F.2d 921, 926 (5th Cir.1976), in which an indictment was filed on September 5, 1974, the court stated, "in order to convict the government must have alleged and proved *an overt act* in furtherance of the conspiracy occurring *on or after* September 5, 1969, and thus within the five years prior to the return date of the indictment." (Emphasis added.) Conversely, in *United States v. Bethea*, 672 F.2d 407, 419 (5th Cir. Unit B 1982), where an indictment was returned on February 21, 1980, the court stated: "[i]n order for [the defendant's] conviction to have been proper, the jury must have found that one of the acts of racketeering activity occurred after February 21, 1975." In addition, in *United States v. Parker*, 586 F.2d 422, 427 (5th Cir.1978), *cert. denied*, 441 U.S. 962, 99 S.Ct. 2408, 60 L.Ed.2d

1067 (1979), a case in which the last overt act alleged to support the conspiracy occurred on April 16, 1971, the court found that the indictment filed on April 15, 1976, was filed "a matter of a few hours before the applicable statute of limitations ran." (Footnote omitted.)

In *United States v. Edwards,* 777 F.2d 644 (11th Cir.1985), in which the last overt act alleged occurred on March 6, 1979, the grand jury returned an indictment on March 2, 1984, when "four days remained before the five-year deadline [of 18 U.S.C. § 3282] expired on the drug charges." 777 F.2d at 647 (footnote omitted). Thus, *Edwards* is as close as this circuit has come to resolving the anniversary date filing of an indictment. Our issue is compounded because the offenses charged are non-overt-act offenses, and thus, the government is not required to allege an overt act in order to obtain a conviction. Therefore, we need also resolve, in a non-overt-act context, the date from which to measure the five-year period within which the government must obtain an indictment.

The above-mentioned cases are not controlling because they do not address our precise issue. The Second Circuit considered this precise issue in *United States v. Guerro,* 694 F.2d 898 (2d Cir.1982), *cert. denied,* 459 U.S. 1222, 103 S.Ct. 1230, 75 L.Ed.2d 463 (1983). In *Guerro,* the defendants were charged with conspiracy to sell explosives stolen from the United States, in violation of 18 U.S.C. § 371. The sale occurred on December 29, 1976. The indictment was filed on December 29, 1981. The Second Circuit held that the prosecution was not barred by 18 U.S.C. § 3282, stating that "[t]he long established general rule is that a statute of limitations begins to run on the day following the day on which the event giving rise to the cause of action occurred." 694 F.2d at 901 (citing *Burnet v. Willingham Loan & Trust Co.,* 282 U.S. 437, 51 S.Ct. 185, 75 L.Ed. 448 (1931)). The court further noted that "[t]his principle has been applied in criminal as well as civil cases. 'The general rule is that the day of the offense or act is excluded and the day on which the indictment is filed is included.' *United*

States v. Mahler, 181 F.Supp. 900, 903 (S.D.N.Y.1960) (footnote omitted)." 694 F.2d at 901-02.

[1] We find persuasive the Second Circuit's decision in *Guerro.* Because we find that the conspiracy in this case ended on July 12, 1979, we conclude that the indictment filed on July 12, 1984, was timely. Appellants' assertion that the indictment must allege an overt act to satisfy the statute of limitations is without merit. The law is well settled that neither 21 U.S.C. § 846 nor 21 U.S.C. § 963 require that an overt act in furtherance of the conspiracy be alleged. *See United States v. Elledge,* 723 F.2d 864, 866 (11th Cir.1984).

[2-5] We hold that on a non-overt-act conspiracy charge, the indictment satisfies the requirements of the statute of limitations if the government alleges and proves, at trial or pretrial, that the conspiracy continued into the limitations period. *United States v. Coia,* 719 F.2d 1120, 1124 (11th Cir.1983), *cert. denied,* 466 U.S. 973, 104 S.Ct. 2349, 80 L.Ed.2d 822 (1984). We further hold that on conspiracy charges which require listing of overt acts, the statute of limitations is satisfied if the last overt act alleged and proved occurs within the limitations period. In both instances (non-overt act or overt act), the day following the event is the beginning date for calculation, and the date of the filing of the indictment or information is included. Thus, in this case, the conspiracy continued until July 12, 1979; the day following, July 13, 1979, is the first day in the calculation. The indictment filed on July 12, 1984, was timely.

2. Delay in Prosecution

[6] The appellants also contend that the trial court erred in denying their motions to dismiss because of prejudicial delay in commencing prosecution. They assert three bases in support of their position: Rule 48(b), Federal Rules of Criminal Procedure, the fifth amendment, and the sixth amendment.

Rule 48(b), Fed.R.Crim.P. provides:

If there is an unnecessary delay in presenting the charge to

> a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

We are reminded that "prosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt. To impose such a duty 'would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself.'" *United States v. Lovasco,* 431 U.S. 783, 790, 97 S.Ct. 2044, 2049, 52 L.Ed.2d 752, 760 (1977) (quoting in part *United States v. Ewell,* 383 U.S. 116, 120, 86 S.Ct. 773, 776, 15 L.Ed.2d 627, 631 (1966)). The rule thus vests much discretion in the trial court, and dismissal is mandatory only if the defendant's constitutional rights have been violated. *United States v. Edwards,* 577 F.2d 883, 887 n. 1 (5th Cir.), *cert. denied,* 439 U.S. 968, 99 S.Ct. 458, 58 L.Ed.2d 427 (1978).

[7, 8] We can quickly resolve the appellants' sixth amendment argument. The sixth amendment right to a speedy trial applies only after a defendant has been arrested, charged, or indicted. *United States v. Marion,* 404 U.S. 307, 312-13, 92 S.Ct. 455, 459, 30 L.Ed.2d 468, 474 (1971); *Stoner v. Graddick,* 751 F.2d 1535, 1541 (11th Cir.1985). Because the delay alleged in this case occurred prior to indictment, the sixth amendment is inapplicable.

[9-11] Appellants also contend that the pre-indictment delay violated their fifth amendment due process rights. The "Due Process Clause has a limited role to play" in protecting against the prejudice of pre-indictment delay. *United States v. Lovasco,* 431 U.S. at 789, 97 S.Ct. at 2048, 52 L.Ed.2d at 758. To show a due process violation, the defendant has the burden of showing: (1) that the delay caused actual prejudice to the conduct of his defense, and (2) that the delay was the product of deliberate action by the government designed to gain a tactical advantage. *United States v. Warren,* 772 F.2d 827, 836 (11th

Cir.1985). *See United States v. Marion,* 404 U.S. at 321-27, 92 S.Ct. at 463-67, 30 L.Ed.2d at 479-82. This standard is "an exceedingly high one." *Tiemens v. United States,* 724 F.2d 928, 929 (11th Cir.1984). The district court found that appellants Butler and Waites had made no specific showings of prejudice sufficient to justify dismissal. Prejudice is not to be presumed because of a lengthy delay in initiating prosecution. *Stoner v. Graddick,* 751 F.2d at 1544. "Speculative allegations, such as general allegation of loss of witnesses and failure of memories are insufficient to demonstrate the actual prejudice required. . . ." *United States v. Radue,* 707 F.2d 493, 495 (11th Cir.), *cert. denied,* 464 U.S. 916, 104 S.Ct. 281, 78 L.Ed.2d 259 (1983) (quoting *United States v. McGough,* 510 F.2d 598, 604 (5th Cir.1975)). "When a defendant asserts prejudice because of the loss of evidence, he must show that the loss impaired his ability to prove a meaningful defense." *Stoner v. Graddick,* 751 F.2d at 1544 (quoting *United States v. Solomon,* 686 F.2d 863, 872 (11th Cir.1982)). The district court determined that Holmes suffered prejudice due to the lengthy pre-indictment delay, but concluded that the government did not deliberately delay prosecution to gain a tactical advantage. At most, the evidence shows that the government failed to prosecute the case earlier because it "wasn't interested" in the case. The government's inaction in bringing the case is insufficient, standing alone, to establish that the government's actions were motivated by an attempt to gain a tactical advantage.

[12] We hold that the district court did not abuse its discretion in refusing to dismiss the prosecution under rule 48(b). *See United States v. Mitchell,* 723 F.2d 1040, 1050 (1st Cir. 1983).

3. Severance

[13] Butler and Waites contend that the trial court erred in failing to grant them a severance. The record does not reveal that Butler moved for a severance. A defendant who fails to move for a separate trial has no cause to complain because of a joint trial absent a showing that he suffered actual prejudice

as a result of the joint trial. *United States v. Washington,* 550 F.2d 320, 328 (5th Cir.), *cert. denied,* 434 U.S. 841, 98 S.Ct. 138, 54 L.Ed.2d 105 (1977). Butler has not satisfied this burden. Waites, however, moved for a severance on several occasions.

[14, 15] The prevailing judicial attitude is that persons who are charged together should be tried together. *United States v. Sans,* 731 F.2d 1521, 1533 (11th Cir.1984), *cert. denied,* ..... U.S. ....., 105 S.Ct. 791, 83 L.Ed.2d 785 (1985). This is based largely on the desire to avoid multiple litigation and to conserve judicial resources. *United States v. Bynum,* 566 F.2d 914, 920 (5th Cir.), *cert. denied,* 439 U.S. 840, 99 S.Ct. 130, 58 L. Ed.2d 138 (1978) (citing *United States v. Morrow,* 537 F.2d 120, 136 (5th Cir.1976)). The granting or denial of a severance is within the discretion of the trial judge, and will be overturned only for abuse of discretion. *United States v. Bovain,* 708 F.2d 606, 608 (11th Cir.), *cert. denied,* 464 U.S. 898, 104 S.Ct. 251, 78 L.Ed.2d 238 (1983). In order to show that the trial judge abused his discretion in failing to grant a severance, the appellant must demonstrate that the denial of a severance resulted in specific and compelling prejudice against which the trial court was unable to afford protection. *United States v. Riola,* 694 F.2d 670, 672 (11th Cir.), *cert. denied,* 464 U.S. 834, 104 S.Ct. 118, 78 L.Ed.2d 117 (1983). Only if the jury could not separate the evidence relevant to each appellant and render a fair and impartial verdict as to each should severance be granted. *United States v. Meester,* 762 F.2d 867, 883 (11th Cir. 1985). The test is a stringent one. *United States v. Bovain,* 708 F.2d at 608.

[16] When a defendant alleges prejudice resulting from a "spill-over" effect as Waites has done here, the defendant must demonstrate the jury's inability to make an individualized determination as to each defendant. Demonstrating that acquittal would have been more likely had the defendant been tried separate or that the evidence was stronger against a codefendant does not satisfy the burden. Some degree of bias is inherent in a joint trial. *Meester,* 762 F.2d at 883-84.

[17, 18] The allegedly prejudicial evidence was presented during cross-examination of Holmes, after Waites had rested his case. The conversation made no reference to Waites, and Holmes testified that he had never met Waites prior to the trial. The court gave cautionary instructions to the jury to consider and weigh the evidence against each appellate individually. Such an instruction limits the likelihood of a "spill-over" effect. *Meester,* 762 F.2d at 884. Under these circumstances, Waites has not made a sufficient showing of compelling prejudice.

Waites also asserts that the trial court should have given appropriate instructions at the time it admitted into evidence the tape-recorded conversation. When a redacted version of the tape was played during Bosarge's testimony, the court instructed the jury not to consider the statements made therein as true, except as to Holmes. When the government again sought to introduce a more complete version of the tape during Holmes's cross-examination, Waites requested a relevance instruction, but the judge stated that the appellants were not entitled to a relevancy instruction in a joint trial if the evidence was relevant to any of the appellants. The judge thus gave no instructions.

[19-21] The record does not reveal that Waites requested any limiting instructions other than the relevancy instruction. Therefore, Waites must show that the failure to give the instruction amounted to plain error. *Meester,* 762 F.2d at 880. Plain error is error which, when examined in the context of the entire case, is so obvious that failure to notice it would seriously affect the fairness, integrity, and public reputation of the judicial proceedings. *United States v. Russell,* 703 F.2d 1243, 1248 (11th Cir.1983). We do not find plain error in these circumstances.

4. Extrinsic Act Evidence

[22] Appellants also contend that the trial court abused its discretion in allowing the government to introduce a tape-re-

corded conversation between Holmes and Bosarge that occurred three years after seizure of the MORNING STAR. The appellants contend that the tape contained no relevant evidence concerning the conspiracy alleged in the indictment. It was extremely prejudicial, however, in that it contained a general discussion regarding the importation of marijuana in which Holmes displayed a knowledge of smuggling. The acts were not relevant to any issue other than the appellants' character, and the probative value of this evidence was clearly outweighed by the undue prejudice to the appellants. We find this contention without merit.

[23-25] Much of the evidence was not extrinsic act evidence because it involved an uncharged offense which arose out of the same transaction or series of transactions as the charged offense. *United States v. Saintil,* 753 F.2d 984, 987 (11th Cir.), *cert. denied,* ____ U.S. ____, 105 S.Ct. 2712, 86 L.Ed.2d 727 (1985). Thus, it falls outside of the proscriptions of Federal Rule of Evidence 404(b). *Saintil,* 753 F.2d at 988. In *United States v. Beechum,* 582 F.2d 898 (5th Cir.1978) (en banc), *cert. denied,* 440 U.S. 920, 99 S.Ct. 1244, 59 L.Ed.2d 472 (1979), this court's predecessor articulated the standard to be used in determining the admissibility of evidence of acts extrinsic to the indictment, under Federal Rules of Evidence 403 and 404(b). *Beechum* established a two-prong test for admissibility. The court must first determine whether the proffered testimony is relevant to an issue other than the defendant's character. If such relevancy is established, it must then determine whether the probative value of the evidence is substantially outweighed by the prejudice arising from it, and whether the proffered evidence is otherwise admissible under rule 403. *See also United States v. Kerr,* 778 F.2d 690 (11th Cir.1985) (citing *Beechum* with approval). The district court did not abuse its discretion in allowing this evidence. *See United States v. Mitchell,* 666 F.2d 1385, 1390 (11th Cir.), *cert. denied,* 457 U.S. 1124, 102 S.Ct. 2943, 73 L.Ed.2d 1340 (1982). In addition, the trial court gave limiting instructions to lessen the prejudicial impact. *See United States v. Reme,* 738 F.2d 1156,

1164-65 (11th Cir.1984), *cert. denied,* ..... U.S. ....., 105 S.Ct. 2334, 85 L.Ed.2d 850 (1985). The Supreme Court has recognized that the crucial assumption underlying the jury system is that juries will follow instructions given them by the trial judge. *Parker v. Randolph,* 442 U.S. 62, 72-73, 99 S.Ct. 2132, 2138-39, 60 L.Ed.2d 713, 723 (1979).

5. Sufficiency of the Evidence

Appellants Holmes and Waites also contend that the evidence was insufficient to support their convictions. We must view the evidence in the light most favorable to the government. *Glasser v. United States,* 315 U.S. 60, 79-80, 62 S.Ct. 457, 469, 86 L.Ed. 680, 704 (1942); *Duncan v. Stynchcombe,* 704 F.2d 1213, 1215 (11th Cir.1983). The evidence will be deemed sufficient unless we find that no rationale trier of fact could have found proof of guilt beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 322-25, 99 S.Ct. 2781, 2790-92, 61 L.Ed.2d 560, 576-77 (1979). We are mindful that "mere knowledge of the conspiracy in association with the conspirators is insufficient evidence to support a conspiracy conviction." *United States v. Russo,* 717 F.2d 545, 549 (11th Cir. 1983).

[26] As to Holmes, the testimony indicates that he had been at the Rod and Reel before and after the drug arrests. Holmes was also present at the time the MORNING STAR was purchased prior to the drug arrests. Bosarge testified that he met with Butler and Holmes before and after the arrest, and that Butler told Bosarge that if he needed anything, including money, to contact Holmes. Holmes, according to Bosarge, stated there was no hurry in getting back money that he had fronted because "as soon as the boat got in, we'll all have plenty of money," and that "we'll all have some good smoke." Further evidence establishes an intimate relationship between Holmes and Butler and an in-depth knowledge of the MORNING STAR venture both prior to and after the arrest. This evidence indicates Holmes's involvement in the venture.

The evidence as to Donnie Waites is less compelling. Bosarge testified that Waites had come to the Rod and Reel on several occasions and was able to identify Waites at trial. Waites himself, as well as other co-conspirators, allegedly told Bosarge that he was going to fly over the boat when it came in through the Yucatan. Bosarge further testified that he had first met Waites at Butler's house before the purchase of the Rod and Reel and that Bosarge, Waites, and others went out on another co-conspirator's boat, and that Bosarge showed how to get into the fish camp from the waterways. A member of the original crew of the MORNING STAR arrested in 1979 testified that he had met Waites prior to the arrest and was told that he would be flying over the boat as cover. The co-conspirator saw an airplane early on the morning of the arrest and once it became daylight, saw the same plane circling overhead. The co-conspirator had previously described Waites, and the jury was able to evaluate this description because counsel had Waites stand up during the closing argument for comparative purposes.

[27, 28] The uncorroborated testimony of an accomplice is sufficient to support a conviction if it is not on its face incredible or otherwise insubstantial. *United States v. Iacovetti*, 466 F.2d 1147, 1153 (5th Cir.1972), *cert. denied*, 410 U.S. 908, 93 S.Ct. 963, 35 L.Ed.2d 270 (1973). We find that not only was Bosarge's testimony not on its face incredible or otherwise insubstantial, but that it was corroborated by the other evidence adduced at trial. Although it was never established whether the plane flying above the MORNING STAR was acting as a spotter for the MORNING STAR, or whether Waites was in that plane, we find the evidence sufficient such that a reasonable trier of fact could have found beyond a reasonable doubt that Waites was involved in the conspiracy.

The judgments are affirmed.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-7021

D.C. Docket No. 84-00081

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOE B. BUTLER,
DAVID R. HOLMES,
DONNIE WAITES,

Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Alabama

Before JOHNSON and HATCHETT, Circuit Judges, and ALAIMO*, Chief District Judge.

J U D G M E N T

These causes came on to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, and were argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgments of conviction of the said District Court in this cause be and the same is hereby, AFFIRMED.

Entered: July 7, 1986
For the Court: Miguel J. Cortez, Clerk

By: /s/ Sudie Harris
Deputy Clerk

ISSUED AS MANDATE: Aug. 20, 1986

*Honorable Anthony A. Alaimo, Chief U. S. District Judge for the Southern District of Georgia, sitting by designation.

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
August 11, 1986

TO ALL PARTIES LISTED BELOW:

NO. 85-7021 U.S.A. v. BUTLER, et al.

This is to advise that an order has this day been entered denying the petition( ) for rehearing.

___ The Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the petition( ) for rehearing en banc has also been denied.

XX No member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure, Eleventh Circuit Rule 26), the petition( ) for rehearing en banc has also been denied.

See Rule 41, F.R.A.P., and Eleventh Circuit Rule 27 for issuance and stay of the mandate.

Sincerely,
Miguel J. Cortez, Clerk

By: /s/ Sandra L. Seabury
Deputy Clerk

REPORT OF INVESTIGATION

File No.: GQ-82-0019

File Title: Joe B. Butler, et al.

Date Prepared: 1/14/83

DRUG RELATED INFORMATION:

1. On January 10, 1983 Special Agent (SA) Clifton L. Brown and United States Customs Patrol Officer (CPO) Harold Parker debriefed Cooperating Individual (CI) SGQ-82-0004 at Ocean Springs, Mississippi. According to the informant, the informant has been involved in two marihuana smuggling attempts utilizing the F/V MORNING STAR.

2. According to the CI, the CI was at his residence in Mississippi when a friend of his from Florida, Steve GARRETT, came by his house. The CI related that they went to a bar and drank beer and, while at that location, GARRETT asked the CI if he would like to make some fast money. GARRETT informed SGQ-82-0004 that he had a yacht coming in loaded with marihuana and needed a place to unload. The CI stated that he found a place out in the woods on Three Rivers at which to unload the vessel, however, this deal fell through and the Three River location was never utilized.

3. The CI related to SA Brown and CPO Parker that about three weeks later, some time in December 1978, GARRETT met with the CI and informed the CI that he had another smuggling venture and asked if the CI would like to make $30,000. GARRETT informed the CI that they would be gone approximately six days. The CI further informed SA Brown and CPO Parker that he traveled to the Ramada Inn on Dauphin Island Parkway in Mobile, Alabama at which time he met with other individuals that would be involved in this marihuana smuggling attempt. From there they went to the F/V MORNING STAR that was docked at Dayton Graham's Seafood business in Bayou LaBatre, Alabama. At that time he was informed that they would take the vessel to Jamaica to

pick up a quantity of marihuana. From that location the CI traveled to Joe and Dana BUTLER's residence that was, at that time, located on Clubhouse Road, Mobile, Alabama. They discussed the marihuana smuggling venture at that location for a while and then traveled to Al SPRINKLE's residence on Rangeline Road in Mobile County, Alabama. At SPRINKLE's residence, Al SPRINKLE informed the CI that he was going to be another deck hand on the vessel.

4. The next morning they all met at the F/V MORNING STAR at which time they obtained food and other provisions and loaded them on the boat. At that location, the CI met Pat (true identity believed to be Patrick WALDROP). They all then entered an automobile and drove to Goldenmeadow, Louisiana. The CI informed SA Brown and CPO Parker that the CI, Joe BUTLER, Pat and Steve GARRETT all made this trip. After arriving in Goldenmeadow, the CI was informed that the unloading spot would be at a storage shed that, at that time, was located next to the Quality Bar and across the street from Jack's Restaurant in Goldenmeadow, Louisiana. The CI was informed that a man was to turn off the light that was around the storage shed but when they returned with the vessel to unload it if the light had not been turned off, they were to shoot the light out with a rifle.

5. The CI then related that they all came back to Bayou LaBatre at which time they boarded the F/V MORNING STAR. The CI, Steve GARRETT, and Al SPRINKLE then piloted the boat to Goldenmeadow, Louisiana. They stayed there for a couple of days and then left. The CI was informed by Steve GARRETT that the boat "belonged to a dead man". The CI said he understood this to mean David HOLMES had purchased this vessel and had had the boat registered in someone else's name and that this individual did not exist. The CI also stated he believed that Junior THOMPSON of Bayou LaBatre, Alabama, the past owner of the F/V MORNING STAR, had been paid a lot of money under the table to keep quiet about the method the boat had been sold and who had actually purchased the vessel.

6. After a couple of days, the CI, Steve GARRETT and Al SPRINKLE departed from Goldenmeadow, LA in the F/V MORNING STAR. They proceeded in the direction of the Yucatan and had engine trouble. It then headed for Key West, FL. According to the CI, the fuel pump ceased to operate on the F/V MORNING STAR and they then called for assistance from the Coast Guard. The CI related that the Coast Guard met them in the Gulf of Mexico and towed them into a dock in Key West, FL. According to SGQ-82-0004, while in Key West, Florida they fixed the fuel pump on the vessel and then departed and headed for the west end of Jamaica. The CI described this location as being on the west end of the island and they could see a Holiday Inn and an airport. While anchored off the west end of Jamaica they met people there and these individuals brought the marihuana out to them in three small boats. According to the CI, each boat made approximately four or five trips and that the F/V MORNING STAR hold was completely filled with marihuana. The CI related that the people that had brought the marihuana out to the vessel gave Steve GARRETT two packages and he was informed by these individuals that one of the packages contained marihuana for them to smoke and the other package was to be personally turned over to one of the truck drivers that would meet them in Goldenmeadow, Louisiana.

7. The CI stated after arriving in Goldenmeadow, Louisiana, they talked to Pat and Joe BUTLER on Citizen Band radios. According to the CI, they had been equipped with a special Citizen Bank radio that split channels, therefore allowing them to communicate via radio without other individuals with Citizen Band radios being able to monitor their traffic. The CI related they anchored out in the water until night and then they came into the offload site in Goldenmeadow where there were trucks waiting for them and four unidentified individuals. After the vessel was unloaded, the trucks departed the area and then the CI, SPRINKLE and GARRETT took the F/V to Empire, Louisiana and left the vessel at that location.

8. SGQ-82-0004 related to SA Brown and CPO Parker that

Al SPRINKLE gave the CI approximately $5,000 and that he would give him the rest of the money in approximately 3 days. The CI informed the debriefing agents that he met Al SPRINKLE in Theodore, Alabama approximately 3 days later at which time he went to Al's house and picked up the rest of the money, approximately $25,000. Also, at that time, Al SPRINKLE asked the CI if he would go pick up the F/V MORNING STAR in Empire, Louisiana and bring it back to Bayou La-Batre for $1,000. According to the CI, he declined to bring the vessel back to Alabama and he believes Steve GARRETT went to Louisiana and brought the vessel back.

9. SGQ-82-0004 related to SA Brown and CPO Parker several months after he returned from the trip to Jamaica aboard the F/V MORNING STAR the CI was at Discount Seafood on the Mississippi Gulf Coast at which time he saw Steve GARRETT and Al SPRINKLE and someone else on board the F/V MORNING. GARRETT asked the CI about obtaining a shrimping license in Mississippi and related to the CI that he had just been arrested for illegal shrimping in Louisiana. Also the CI related that Joe BUTLER and Al SPRINKLE wanted to look for some land at which they would unload a quantity of marihuana. The CI took them to Bill's Ferry which is located at the end of 28th Street in the Long Beach/Pass Christian, Mississippi area. The CI stated that they looked at the property but did not like it and told the CI to continue looking for an off-load site.

10. SA Brown and CPO Parker were informed by the CI that a couple of weeks later Pat and Joe BUTLER came to the CI's residence in Gulfport, Mississippi and asked him about finding a place to unload a shipment of marihuana and that when the CI located a suitable place he was to call Joe BUTLER and let him know what had been found. Additionally, Pat asked if the CI would take a small vessel belonging to the CI offshore into the oil rigs and meet the F/V MORNING STAR and to escort the F/V MORNING STAR in to the location at which it was to be unloaded. Additionally, Pat told the CI that he would pay the CI $90,000 but the CI had to

furnish the CI's own deck hands and off-loading crew. According to the CI, Pat informed the CI that the rest of the load would be unloaded in Louisiana and would be shipped north for sale but the portion that would be unloaded in Mississippi would be delivered to Mobile, Alabama.

11. According to the CI, the CI found a suitable location at the Rod and Reel Fish Camp in Ocean Springs, Mississippi. After the members of the organization had observed the location of the Rod and Reel Fish Camp the CI was informed that the entire load would be unloaded at the Rod and Reel Fish Camp. According to the CI, he then went to Mobile, Alabama and met with the individual that was to be the captain of the F/V MORNING STAR. The CI remembers that this individual was from Key West, Florida, had a stout build and long hair. The CI related that when he was in Mobile meeting with the captain, the captain and an individual named Bobby (true identification believed to be Robert HOSKINS) were a Joe BUTLER's house. The CI related that he was informed by these individuals that they would meet him at the Ocean Springs Harbor in two days. According to SGQ-82-0004 he met these individuals at the Ocean Springs Harbor and brought them in his vessel to the Rod and Reel Fish Camp and then they proceeded out to Ship Island. The CI related that the individuals he met at the Ocean Springs Harbor were Bobby, the captain and an individual named Don. The CI stated that Don was supposed to be an airplane pilot. The CI related to SA Brown and CPO Parker that he was informed that Bobby already had purchased the loan and that all that he needed was a place to unload and a vessel to transport the marihuana. The CI stated that Pat agreed with Bobby to furnish the boat MORNING STAR and an unload site for ½ the load.

12. The CI informed the debriefing agents that Pat told the CI that if they unloaded the marihuana at the Rod and Reel Fish Camp that he could have the fish camp and that all that he needed to do was to leave the fish camp for approximately one week during the period of time that the F/V MORNING STAR would be arriving at that location. The CI also stated

Pat indicated that the reason he desired the CI to depart was because he did not want the owner of the location to be present if the marihuana was seized as it was being unloaded. The CI related that they went to Hamm's Reality in Ocean Springs and that Pat used a phony name when dealing with the individual at Hamm's Reality.

13. SGQ-82-0004 related to SA Brown and CPO Parker that the next day the CI met with Joe BUTLER and that Joe BUTLER brought the CI two checks or a bank draft in the name of David HOLMES for $61,000. The CI then stated that he then met with the Realtor and purchased the property and went to Mobile and met with Joe BUTLER and told them that everything had been taken care of so far as the purchase of the Rod and Reel Fish Camp. The CI related that after approximately three weeks from the date of the purchase the CI started moving into the Rod and Reel Fish Camp.

14. The CI related that after moving into the Rod and Reel Fish Camp an individual named BLAKE came and stayed at the residence at the Rod and Reel Fish Camp and a Donnie LNU from Key West, Florida also came. BLAKE was supposed to be Pat's right hand man. The CI related that BLAKE and the CI went to the Holiday Motel on the beach in Biloxi, Mississippi and met two other individuals that were residing there. These individuals were supposed to provide counter surveillance during the unloading of the F/V MORNING STAR and they were to pretend that they were fishing on the bridge on old highway 90 that overlooks the access way into the Rod and Reel Fish Camp.

15. According to the CI, several days later BLAKE drove up to the Rod and Reel Fish Camp and told the CI that the MORNING STAR had been seized and they were to get all the equipment out from the area of the Rod and Reel Fish Camp.

NON DRUG RELATED INFORMATION:

None furnished.

FINANCIAL INFORMATION:

None furnished.

INDEXING SECTION:

1. F/V MORNING STAR, NADDIS 392354.
2. Steve GARRETT, NADDIS 128208.
3. Al SPRINKLE, NADDIS 1129852.
4. Joe BUTLER, NADDIS 421684.
5. Dana BUTLER, NADDIS 1062899.
6. Pat LNU, believed to be Patrick WALDROP, NADDIS 950401.
7. David HOLMES, NADDIS 1361693.
8. Junior THOMPSON, NADDIS 1361697.
9. Bobby LNU, believed to be Robert HOSKINS, NADDIS 724044.
10. Don LNU, no description available, NADDIS negative.
11. BLAKE, no description available, NADDIS negative.
12. Donnie LNU, no description available, NADDIS negative.

/s/ Clifton L. Brown

SA Clifton L. Brown
Mobile, Alabama